LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1973

No. 73-1857

R. FISKE WHITNEY,
Petitioner,

v.

THE NEW YORK STOCK EXCHANGE
AND
FRANCIS I. DuPONT & CO.,
Respondents.

BRIEF OF RESPONDENT NEW YORK STOCK EXCHANGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD J. REILLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondent
New York Stock Exchange

OF COUNSEL:

MILBANK, TWEED, HADLEY & McCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005

Question Presented

Whether Petitioner, who has recovered all his damages from Respondent duPont through arbitration, has presented any special or important reason for granting his petition for a writ of certiorari?

Counter-Statement of the Case

Petitioner is a former customer of Respondent Francis I. duPont & Co., a stock brokerage firm and member organization of Respondent New York Stock Exchange. 3(a)* He brought this action in August 1967 to recover damages sustained during the latter part of 1962. The complaint charges duPont with clerical errors, incorrect margin calls and failure to follow Petitioner's instructions. The Exchange is alleged to have failed to take appropriate measures against duPont after being notified of the errors committed by duPont.

The action was stayed pending arbitration between Petitioner and duPont of any controversy relating to Petitioner's account, including those specifically alleged in the complaint. The arbitration panel granted an award in favor of Petitioner for $12,364.68.

Thereafter, duPont moved to confirm the award and the Exchange moved for summary judgment. The affidavit in support of the Exchange's motion shows that the Exchange properly performed its duties by the exercise of surveillance over duPont. (13a-19a) The alleged misconduct of duPont was called to the attention of the Exchange by letter (22a), after most of the alleged damage was sustained. The Exchange informed Petitioner that it could not provide him with any monetary relief, that its inquiry would focus on determining whether duPont was guilty of conduct violations warranting Exchange disciplinary action, and that Petitioner should pursue any claim for damages

---

* References are to pages of appendix.

through proper legal channels. (29a, 43a) At the time of the Exchange investigation, the errors in Petitioner's account and the failure to require the minimum margin had been corrected promptly and voluntarily. (18a-19a) The Exchange therefore determined to take no disciplinary action against duPont.

In granting the motions of duPont and the Exchange (101a, 104a), the District Court stated that:

> "plaintiff—without conceding the validity of the Exchange's position as a matter of law—admitted that all elements of damage were included in the material submitted to the arbitrators except plaintiff's right to triple damages and counsel fees under the antitrust laws. The question then is whether the complaint alleges an antitrust cause of action against the Exchange. Plaintiff, admitting he has no authority to support his position, contends that it does because of the Exchange's failure to take effective policing action against duPont after plaintiff had advised the Exchange of duPont's alleged iniquities." (102a)

Petitioner, who previously had been represented at all times by counsel, appealed *pro se* to the Court of Appeals for the Second Circuit. Upon the conclusion of the oral argument, the Court affirmed from the bench the order of the District Court.

Reasons for Denying Certiorari

1. Petitioner Has Not Satisfied This Court's Rule 19.

This case involves nothing more than the application of well-settled rules to a particular set of facts. It was correctly decided by the Courts below. The questions raised by the petition are plainly insubstantial and do not satisfy any of the considerations governing review by this Court.

There is no departure from any decision of this Court nor any conflict among the Courts of Appeals on any legal

issue involved. No novel or important federal question is presented for review.

Petitioner seeks to justify granting his petition by arguing that matters of public interest are involved. His broad statements of reasons for granting the petition are unjustified. The issues asserted are not even remotely a part of this case.

2. Petitioner is Barred From Maintaining This Action.

Petitioner's claim against the Exchange is based on the Exchange's alleged liability for losses suffered by Petitioner caused by duPont. Since those losses have been determined and recovered, this action is barred by the doctrine of collateral estoppel. *Ritchie* v. *Landau*, 475 F.2d 151 (2d Cir. 1973); *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). Petitioner is also barred from a further recovery by the securities laws. 15 U.S.C. § 78bb(a); *Schaefer* v. *First National Bank of Lincolnwood*, 326 F.Supp. 1186 (N.D. Ill. 1970).

3. Petitioner Had No Cause of Action Against the Exchange.

As the District Court noted, Petitioner conceded there is no authority for the argument that failure by the Exchange to exercise the authority granted to it under the Exchange Act constitutes an antitrust violation. Moreover, any antitrust violation would be barred by the four-year statute of limitations. (15 U.S.C. § 15b)

The scope of the Exchange's duties to supervise its member firms is set forth in Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) and the case law thereunder. In order to establish liability, it must be shown: (1) that the Exchange knew or had reasonable cause to know of violations of the Exchange Act, rules and regulations thereunder, or rules of the Exchange, (2)

that it failed to act when it should have acted and (3) that the failure to act caused the alleged loss. *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). None of those elements is present in this case.

Conclusion

There is no reason for this Court to review the decision below. The Petition should be denied.

Respectfully submitted,

EDWARD J. REILLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondent
New York Stock Exchange

OF COUNSEL:

MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005